

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK KING,

Defendant-Appellant.

---

UNPUBLISHED

October 28, 2003

No. 239238

Wayne Circuit Court

LC No. 01-000161-01

Before: Murphy, P.J., and Cooper and C. L. Levin\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316, second-degree murder, MCL 750.317, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, thirty to sixty years in prison for the second-degree murder conviction, twenty-five to fifty years in prison for the carjacking conviction, and two years in prison for the felony-firearm conviction. Defendant's second-degree murder sentence was vacated. We vacate the carjacking conviction, but affirm the murder and felony-firearm convictions.

I

On the night of April 8, 2000, defendant and codefendant Mauricio Veal decided upon a plan to steal the victim's car, a Monte Carlo, from the victim's house. After they arrived at the victim's house, defendant and Veal changed their plan because the victim's other car, a Thunderbird, was parked behind the Monte Carlo, blocking it in. Veal suggested luring the victim, who Veal knew, out of the house so that Veal's friend, "Mick," could steal the victim's Monte Carlo while they were gone. Veal and defendant knocked on the victim's door. Veal asked the victim if he could give him a boost because his car had broken down. The victim agreed, and defendant, Veal, and the victim all got into the victim's Thunderbird. Veal directed the victim to drive to Dacosta, where defendant shot and killed the victim. Although consistent for the most part, defendant's and Veal's versions of what occurred before the victim was shot differ in some respects.

---

\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Defendant told Detroit police officer Derryk Thomas that Veal gave him a gun and instructed him to “do what he had to do” if the victim did not cooperate. Defendant then shot the victim because he was afraid of Veal. Defendant, however, told his then-girlfriend, Sharon Upshaw, that he shot the victim when he tried to summon help. Veal testified that defendant shot the victim for no apparent reason. After defendant shot the victim, he and Veal drove back to the victim’s house to steal the Monte Carlo. As they were attempting to steal it, a neighbor emerged and yelled for them to get away from the car, and they then fled the scene.

## II

Defendant’s first contends that the trial court erred in failing to suppress his custodial statement because a writ of habeas corpus was used to move him from one detention facility to another for questioning. This claim was not raised below. Defendant also argues that his custodial statement should have been suppressed because there was unrefuted evidence that defendant invoked his right to counsel before signing the statement, and he was falsely promised that he would be given access to an attorney after signing the statement. We disagree with both arguments.

The trial court held a pretrial *Walker*<sup>1</sup> hearing to determine whether defendant voluntarily gave his custodial statement. Defendant testified that he had been physically coerced into signing the statement, and that he had requested, and been promised by Thomas, a lawyer before signing the statement. Thomas testified that he did not threaten, force, or make defendant any promises in order to persuade defendant to talk, and that defendant had not requested an attorney. Thomas testified that defendant had been informed of his constitutional rights, and voluntarily gave a statement. The court found that defendant was not credible. The court concluded that the statement was given voluntarily, and denied the motion to suppress.

Generally, a trial court’s ruling on a motion to suppress evidence is reviewed with deference and will not be disturbed unless clearly erroneous, *People v Hamilton*, 465 Mich 526, 529; 638 NW2d 92 (2000), overruled in part on other grounds sub nom *Bright v Ailshie*, 465 Mich 770 (2002). A decision is clearly erroneous when, after a review of the record, this Court is left with a definite and firm conviction that a mistake had been made. *People v Armendarez*, 188 Mich App 61, 65-66; 468 NW2d 893 (1991). Review of an unpreserved challenge to a trial court’s ruling on a motion to suppress is for plain error that affected defendant’s substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999).

The record reflects that on December 5, 2000, defendant was moved from the Macomb County Jail, where he was already in custody for probation violation, to the headquarters of the Detroit Police Department located at 1300 Beaubien, for questioning in relation to the instant case. Relying on *People v Casey*, 102 Mich App 595; 302 NW2d 248 (1980), defendant argues that the statement he gave while at 1300 Beaubien was the product of an illegal writ because the

---

<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

writ was impermissibly used by Detroit police to transfer defendant to Detroit police headquarters solely for the purpose of undergoing police interrogation, and thus, it was “essentially no different than the illegal ‘reverse writ’ [procedure] condemned in *Casey*, [*supra*].”<sup>2</sup> In *Casey*, *supra*, the conviction was reversed not because of the reverse writ procedure, but rather, because the defendant had been illegally arrested based on insufficient evidence. *Casey*, *supra*, 102 Mich App 602. “*Casey* merely held that the reverse writ could not be used to justify an otherwise illegal arrest and detention.” *People v Cipriano*, 431 Mich 315, 338; 429 NW2d 781 (1988).

In contrast with *Casey*, *supra*, the police in the instant case had probable cause to believe that defendant had shot and killed the victim. See *Cipriano*, *supra*, 431 Mich 338. Upshaw had already given a statement to the police concerning what defendant had told her about his role in the shooting, and defendant matched the description of the man Alicia had seen talking to the victim at her door before the victim left the house on the night he was killed. Therefore, *Casey*, *supra*, is inapplicable. Given that defendant’s statement was not the product of an unlawful detention, defendant has failed to demonstrate a plain error in the writ procedure that affected his substantial rights. *Carines*, *supra*, 460 Mich 763-764.

We also reject defendant’s argument that the trial court erred in rejecting his testimony that the police failed to honor his request for an attorney. At a *Walker* hearing, “[a] trial court must view the totality of the circumstances in deciding whether a defendant’s statement was knowing, intelligent, and voluntary.” *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). At the hearing, Officer Thomas testified that he took defendant’s statement after defendant read out loud his constitutional rights from the form provided to him by Thomas and after defendant signed an advice of rights form stating that he understood his rights and wished to make a statement. Thomas also testified that he did not make defendant any promises, and that defendant did not request a lawyer. Having heard the testimony of both Thomas and defendant, including defendant’s responses to its supplementary questions, the court determined that defendant’s testimony was not credible, and that Thomas’ testimony, in contrast, was credible. “[B]ecause the demeanor of witnesses and credibility are so vitally important to a trial court’s determination,” this Court gives deference to the trial court’s credibility determination at a *Walker* hearing. *People v Snider*, 239 Mich App 393, 418; 608 NW2d 502 (2000).

Because defendant testified at the *Walker* hearing that he requested and was promised a lawyer by Thomas, that aspect of defendant’s testimony was included in the court’s credibility determination, and was thus found to be unworthy of belief. It was not necessary for the court, in making its credibility finding, to single out any particular part of defendant’s testimony. Defendant has offered no reason that would justify our setting aside the trial court’s credibility determination, and has failed to demonstrate clear error in the trial court’s finding that defendant’s testimony regarding his custodial statement lacked credibility. Accordingly, the trial court did not err in denying defendant’s motion to suppress the statement.

---

<sup>2</sup> In *Casey*, *supra*, the Supreme Court explained that a “reverse writ” was typically a brief hearing during which the police or the prosecutor sought judicial approval for the continued detention of a suspect when no arrest warrant has been issued because of a lack of probable cause. *Casey*, *supra*, 411 Mich 180.

### III

Defendant claims two errors regarding jury instructions. First, he contends that the trial court should have sua sponte instructed the jury on the possibility that Veal, an accomplice to the alleged crime, and Upshaw, an accessory after the fact, might have been motivated to give perjured testimony. Second, he contends that the trial court erred in instructing the jury on evidence of flight.

In this case, defense counsel did not merely fail to request an accomplice testimony instruction, or to object to the flight instruction. Rather, she explicitly expressed satisfaction with the instructions given to the jury. These actions by defense counsel resulted in a waiver, rather than forfeiture, and thus, the waiver extinguished any error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Even under a forfeiture, rather than a waiver, analysis, defendant has failed to show an entitlement to relief. We are satisfied that the failure to give the accomplice instruction and the giving of the flight instruction, did not affect defendant's substantial rights. *Carines, supra* at 750.

### V

During the trial, the court learned that two jurors had asked a deputy whether they could talk about the case. Defendant now argues that the trial court should have inquired whether the jurors had engaged in any improper discussion, and that failure to do so deprived him of an impartial jury. We disagree.

Because defendant failed to challenge the court's inaction, we review this issue for plain error that affected the outcome of the proceedings. *Carines, supra*, 460 Mich 763-764.

Before this Court will order a new trial on the ground of juror misconduct, a defendant must show that the misconduct affirmatively prejudiced his right to a trial before a fair and impartial jury. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). Prejudice must be shown; it cannot merely be the subject of speculation. *People v Schram*, 378 Mich 145, 159-160; 142 NW2d 662 (1966).

Defendant has failed to present any evidence from which this Court may infer that he was prejudiced. Defendant's argument is based on speculation that juror misconduct *may* have occurred, rather than any specific instance of actual juror misconduct. The record indicates that two jurors approached the court's deputy and asked the deputy whether they could talk about the case, to which the deputy's response was that the jurors could not. The court noted on the record that the deputy had not indicated that the jurors had been talking about the case, but only that they had inquired whether they could do so. Further, in direct response to the report of what had occurred, the court instructed the jury as follows:

At no time should you be discussing any aspect of the case until the case is completely over, you've heard the arguments and my instructions and I have said to you, after I swear in the deputies to watch you, that you can then begin

discussing the case so you're not under any circumstances to discuss anything about the case at this point in time.

Because there is no evidence of actual juror misconduct, and because the trial court properly instructed the jurors on their obligation to refrain from discussion before deliberations, defendant has failed to show plain error that affected the outcome of the proceedings.

## VI

Defendant argues that the trial court wrongly admitted evidence regarding his and Veal's thwarted plan to steal a gold Impala. He contends that this evidence was not admissible "bad acts" evidence under MRE 404(b). We review an evidentiary decision for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Reversal is warranted only where there error is outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Given the evidence presented by the prosecutor against defendant, any error in the admission of the evidence was harmless because it is more probable than not that the admission of the evidence regarding the Impala was not outcome determinative.

## VII

Lastly, defendant contends that he was denied the effective assistance of counsel because defense counsel failed to request cautionary instructions regarding Upshaw and Veal, and failed to pursue inquiry regarding possible juror misconduct. Because defendant failed to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness, and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defense counsel's failure to request a cautionary instruction on Veal's and Upshaw's testimony did not amount to ineffective assistance of counsel that would justify reversal. Veal's credibility was adequately challenged, and as a co-defendant his interest in casting blame on defendant was obvious. Upshaw was an accessory, not an accomplice. Under these circumstances, omission of the request was neither objectively unreasonable performance, nor an outcome-determinative error. Consequently, defendant cannot satisfy either prong of the ineffective assistance test.

We also find that defense counsel's failure to seek further inquiry into possible juror misconduct did not render his counsel ineffective. As discussed above, the trial court appropriately handled this situation by reminding the jurors that they could not discuss the case before beginning deliberations. In the absence of any record evidence that the jurors violated

this instruction, we cannot say that it was error for defense counsel to fail to further pursue the matter, or that defendant was prejudiced.

## VIII

Although defendant does not raise the issue on appeal, we note that the trial court vacated the second-degree murder conviction, but not the carjacking conviction. A conviction and sentence for both felony-murder and the underlying felony violates the constitutional principle of double jeopardy. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); US Const, Am V; Const 1963, art I, § 15. The carjacking conviction must therefore be vacated. *Id.*, 225.

Defendant's convictions of first-degree murder and felony-firearm are affirmed. The carjacking conviction is vacated.

/s/ William B. Murphy  
/s/ Jessica R. Cooper  
/s/ Charles L. Levin